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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL FERDIK,

Civ. No. 08-3001-CL

Plaintiff,

v.

ABC, INC., et al.,

ORDER

Defendants.

PANNER, District Judge:

Magistrate Judge Mark D. Clarke filed a Report and Recommendation, and the matter is now before this court. See 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b). In response to the Report and Recommendation, plaintiff Michael Ferdik has filed an amended complaint, and defendant ABC, Inc. moves to dismiss the amended complaint for failure to state a claim.

I adopt the Report and Recommendation. I grant ABC's second motion to dismiss, and dismiss this action with prejudice for failure to state a claim.

I. Ferdik's Civil Rights Claims

The Report and Recommendation recommends dismissing Ferdik's civil rights claims with prejudice. On *de novo* review, I adopt this recommendation.¹ See Lorin Corp. v Goto & Co., Ltd., 700 F.2d 1202, 1206 (8th Cir. 1983) (district court reviews legal principles *de novo* in a Report and Recommendation). Ferdik has not, and cannot, show that any of the defendants should be treated as a state actor, which is necessary to state a claim under 42 U.S.C. § 1983 against a private party. See Franklin v. Fox, 312 F.3d 423, 444-45 (9th Cir. 2002).

II. Ferdik's Defamation Claims

The Report and Recommendation recommends that Ferdik be allowed to file an amended complaint regarding his defamation claims. I adopt this recommendation. Ferdik has filed an amended complaint, which alleges his defamation claims with more specificity. ABC moves to dismiss the amended complaint.

In the amended complaint, Ferdik alleges that defendants have defamed him in numerous songs, movies, and television shows that depict Ferdik and his family in derogatory contexts. For example, Ferdik alleges that a song recorded by the Charlie Daniels Band includes the words, "Every time I see him, it's Ferdik getting by"; that a song recorded by Britney Spears includes the words, "I can see it in your eyes Little Ferdik"; and that the movie *Scooby*

¹ ABC's second motion to dismiss states that the Report and Recommendation dismissed Ferdik's civil rights claims with prejudice. Even without objection, however, a magistrate-judge's recommendation has no effect until this court adopts it.

Doo includes references to Ferdik's family. The amended complaint includes many similar allegations about other songs and movies.

Congress requires that this court dismiss an action filed in *forma pauperis* "at any time if the court determines" that the action is frivolous. 28 U.S.C. § 1915(e)(2)(B)(i). A complaint is frivolous when it lacks an arguable basis in law or in fact. Neitzke v. Williams, 490 U.S. 319, 324 (1989). In Neitzke, the Supreme Court interpreted former 28 U.S.C. § 1915(d), the predecessor to 28 U.S.C. § 1915(e), and held that judges have "not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless," including "claims describing fantastic or delusional scenarios, claims with which federal district judges are all too familiar." Neitzke, 490 U.S. at 327-28; see also Denton v. Hernandez, 504 U.S. 25, 33 (1992) (complaint is factually frivolous "when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them").

Ferdik's allegations in his amended complaint go beyond the factual implausible into the realm of the wholly incredible. It defies belief that the songs, movies, and television shows Ferdik cites in the amended complaint even mention, much less defame, Ferdik or his family. This action must be dismissed with prejudice as frivolous.

CONCLUSION

Magistrate Judge Clarke's Report and Recommendation (#35) is adopted. Defendant ABC's first motion to dismiss (#8) is granted with prejudice as to plaintiff's civil rights claims. Defendant ABC's second motion to dismiss (#40) is granted as to the remaining claims. This action is dismissed with prejudice for failure to state a claim. All pending motions filed by plaintiff (#19, #26, and #43) are denied as moot.

IT IS SO ORDERED.

DATED this 9 day of September, 2008.

A handwritten signature in black ink, appearing to read "Owen M. Panner", is written over a horizontal line.

OWEN M. PANNER
U.S. DISTRICT JUDGE